Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of)	
Commission Seeks Comment on Certain Wireless Interruptions)	GN Docket No. 12-52

REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

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MetroPCS Communications, Inc. ("MetroPCS"), by its attorneys, hereby respectfully submits its reply to the comments submitted in response to the *Public Notice* (the "*Notice*") issued by the Federal Communications Commission (the "Commission" or "FCC") on March 1, 2012, seeking comment on issues related to intentional interruptions of Commercial Mobile Radio Service ("CMRS" or "wireless service") by governmental authorities for the purpose of ensuring public safety. In summary, MetroPCS supports a uniform nationwide process for governmental or quasi-governmental interruptions of service and opposes those commenters who seek to limit a carrier's right to interrupt service on its own. In reply, the following is respectfully shown:

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¹ For purposes of these Reply Comments, the term "MetroPCS" refers collectively to MetroPCS Communications, Inc. and all of its FCC license-holding subsidiaries.

² Public Notice, Federal Communications Commission, *Commission Seeks Comment on Certain Wireless Service Interruptions*, GN Docket No. 12-52, DA 12-311 (rel. Mar. 1, 2012) (the "*Public Notice*").

I. INTRODUCTION AND SUMMARY

In its initial comments, MetroPCS commended the Commission for acknowledging the significant role that wireless services play in emergency situations, for seeking to develop a record on the important legal, safety and policy implications of any government-ordered interruption of wireless service and for considering an appropriate protocol to invoke whenever governmental or quasi-governmental agencies seek the temporary shutdown of wireless services in connection with a perceived threat to persons or property. A diverse group of interested parties filed comments including: (1) carriers and associations representing the interests of wireless service providers;³ (2) public interest groups representing the interests of individuals and consumers;⁴ and (3) groups representing the interests of state and local governments and agencies.⁵ The broad participation should come as no surprise since issues of public safety and individual constitutional rights are of concern to a broad cross-section of groups across the wireless industry and society as a whole.

Some important common themes emerge from the diverse commenters. Most generally recognize the important role that wireless service can play in a crisis. In recognition of this fact, many agree with MetroPCS that wireless services should only be deliberately interrupted by

³ See e.g., Comments of MetroPCS Communications, Inc. ("MetroPCS") (filed Apr. 30, 2012); Comments of Verizon Wireless ("Verizon") (filed Apr. 30, 2012); Comments of CTIA – The Wireless Association ("CTIA") (Apr. 30, 2012).

⁴ See e.g., Comments of New Media Rights (filed Apr. 30, 2012); Comments of Public Knowledge, Center for Democracy & Technology, Electronic Frontier Foundation, Benton Foundation, Free Press, Minority Media and Telecommunications Council, National Hispanic Media Coalition, and Open Technology Institute at the New America Foundation (filed Apr. 30, 2012) ("Comments of Public Knowledge et al."); Comments of American Civil Liberties Union ("ACLU") (filed Apr. 30, 2102).

⁵ See e.g., Comments of San Francisco Bay Area Rapid Transit District ("BART") (filed Apr. 30, 2012); Comments of the California Public Utilities Commission ("CPUC") (filed Apr. 30, 2012); Comments of the American Association of State Highway and Transportation Officials Special Committee on Wireless Communications Technology ("AASHTO") (filed Apr. 30, 2012).

government in very narrow and compelling circumstances based upon substantial evidence that the risk of maintaining service clearly outweighs the harm of discontinuing service. Many commenters also agree that an established coherent uniform process must be in place for determining whether a wireless interruption should be implemented by the government in order to avoid ad hoc decision-making that would cause confusion among carriers, public safety officials, and private citizens. However, there was a general lack of consensus regarding the specific implementation details for the policy.

MetroPCS submits that its proposal, which takes into consideration the length of time available to make a determination, is the most appropriate. The MetroPCS approach builds on other similar processes where governmental intervention requires court orders when time permits. In addition, however, whenever there is insufficient time for court process, the FCC is empowered to make the decision to order a shutdown with input from public safety agencies according to the established protocol. The MetroPCS-recommended approach follows the directive contained in the Communications Act of 1934, as amended, ⁷ which provides direct and compelling authority for the Commission to take on this role, as well as the authority that allows the Commission to preempt state and local attempts at enforcement when exigent circumstances prevent a court order. The Commission, rather than any local, state or other federal agency, is more attuned to the circumstances that may be unique to wireless carriers in emergency public safety situations, and therefore is better prepared to handle these exigent requests and to properly balance the competing interests that arise due to the influence of local circumstances, than, for example, a local government agency.

⁶ See National Security Telecommunications Advisory Committee, 2009-2010 NSTAC ISSUE REVIEW 155 (2010), available at http://www.ncs.gov/nstac/reports/2009%20-%202010%20Issue%20Review%20(FINAL).pdf ("NSTAC Report").

⁷ 47 U.S.C. § 151 *et sea*.

Further, in reply, MetroPCS respectfully disagrees with those commenters who assert that CMRS carriers have no right to voluntarily interrupt their own wireless service. The Commission has properly chosen to forbear from applying the Section 214 discontinuance of service rules to wireless carriers, and has adopted specific provisions in the Commission's rules that allow wireless carriers to temporarily discontinue service without prior Commission approval. Therefore, MetroPCS disagrees with certain statements that were placed into the record suggesting otherwise.

II. THE RECORD SUPPORTS A UNIFORM NATIONWIDE PROCESS FOR GOVERNMENT ORDERED WIRELESS INTERRUPTIONS

Despite the diverse group of commenters in this proceeding, general agreement can be found on some overarching principles. At least one representative of each of the three above-identified groups of commenters recognizes the importance of providing clarity to the public, as well as governments, agencies and carriers, by establishing a single, nationwide protocol for wireless interruptions by an act of government.⁸ The absence of a uniform processes, as commenters recognize, risks confusion, inconsistent actions and perhaps, untimely decisions.⁹

Many commenters also conclude that wireless services often play an important role during a public safety emergency and that a high standard should be applied before a decision is

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⁸ On behalf of wireless service providers' interests, MetroPCS, Verizon and CTIA all separately advocate for a nationwide process, citing the NSTAC protocol, SOP 303. *See* MetroPCS Comment; Verizon Comments, 4 -7; CTIA Comments, 3. New Media Rights, which represents consumers in the communications marketplace, advocates for all potential enforcers of wireless shutdowns to be bound under the same provisions of the Communications Act, emphasizing the need for uniformity. *See* New Media Rights Comments, 4. Finally, the American Association of State Highway and Transportation Officials Special Committee on Wireless Communications Technology ("AASHTO"), representing the interests of state agencies, recognizes that the NSTAC protocol may be successfully used, and that a protocol in general would provide clarity and "profile accountability and responsibility." *See* AASHTO Comments, 4.

⁹ See Verizon Comments, 5.

made and implemented by government to deliberately interrupt service. Several commenters agree with MetroPCS that any agency seeking an interruption should first be required to institute a judicial proceeding -- if time allows. ¹⁰ For example, joint comments submitted by a coalition of public interest groups (the "Public Interest Groups") point out that, due to the potential constitutional violations that may result from a government interruption of wireless service, "the highest possible procedural and substantive standards" must be satisfied, which includes the burden of proving that the restrained speech is unprotected. ¹¹ The American Civil Liberties Union also supports judicial oversight and due process protections, arguing that "if the government cannot identify the specific device or devices that pose the threat, the interruption likely cannot pass muster under the standards of review."

In addition, commenters also agree that the significant public safety risks attendant to a wireless shutdown also mandate a high standard. For example, CTIA notes that in a decision to interrupt service, the costs and benefits must be weighed due to the potential for adverse consequences, ¹³ and Verizon Wireless believes that wireless service interruptions should only be considered as a "last resort." MetroPCS agrees. Extraordinary circumstances must exist in order for the government to request a wireless interruption. ¹⁵

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¹⁰ See e.g., MetroPCS Comments, 5-7; Public Knowledge et al. Comments, 7.

¹¹ The Public Interest Groups support the *Freedman* procedural safeguards: (1) the public agency bears the burden of instituting judicial proceedings and proving that the restrained speech is unprotected; (2) any restraint that occurs prior to judicial review can only be imposed for a brief period; and (3) a prompt final judicial determination must be assured. Public Knowledge et al. Comments, 6 – 9 (citing *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1968)).

¹² Comments of American Civil Liberties Union, 5 (filed Apr. 30, 2012).

¹³ CTIA Comments, 4 -5.

¹⁴ Verizon Comments, 1.

¹⁵ MetroPCS continues to agree with several of the factors listed in BART's Cell Service Interruption Policy: (1) interruption decisions should be based upon strong objective evidence of

However, the parties do not agree on how the policy should be implemented and who should be responsible for making a final determination and communicating it to the wireless carrier. As a result, the Commission will have to make choices on the best path forward. MetroPCS submits that its proposed process best meets the competing policy objectives that are presented because it allows for court orders where appropriate and for prompt action by the appropriate governmental agency, the Commission, when exigent circumstances exist. Any other approach would not meet all of the policy pertinent objectives.

a. The Commission Is The Appropriate Non-Judicial Governmental Entity to Order an Interruption of Wireless Service

MetroPCS found it surprising that it was the only commenter to specifically advocate for the Commission to be the sole governmental agency¹⁶ responsible for requesting a wireless shutdown in exigent circumstances.¹⁷ Others acknowledge the FCC's expertise in promoting public safety through communications, but did not take the logical step of vesting authority on a going forward basis in the FCC. For example, the San Francisco Bay Area Rapid Transit District ("BART") – which has some familiarity with the issue at hand because of its recent controversial interruption of service in a BART station – supports a central role for the Commission. Yet, it advocates that it, and presumably other local governmental or quasi-governmental agencies,

a real threat; (2) the threat must be imminent; (3) there must be a substantial risk of bodily harm or death to individuals or threats to the destruction of property; (4) any necessary interruption of service both in terms of time and geography should be narrowly tailored to address the specific threat; and (5) there should be a substantial likelihood that the proposed interruption will be an essential component in protecting the safety of individuals and preventing the destruction of property. *See* MetroPCS Comments, 10 -11; *see also* BART Cell Service Interruption Policy (adopted Dec. 1, 2011) http://www.bart.gov/docs/final_CSIP.pdf; Comments of BART.

¹⁶ When MetroPCS uses 'governmental agency' it excludes judicial process.

¹⁷ New Media Rights also supports either the FCC or Department of Homeland Security having the authority to make the decision to shut down wireless services. New Media Rights Comments, 13.

should be allowed to maintain their own policies which envision localized decision-making. ¹⁸ Similarly, the Public Interest Groups acknowledge and praise the various rulemaking proceedings that the Commission initiated which demonstrate its determination to make access to wireless emergency services "a priority," but also fail to reach the logical conclusion that the Commission is best situated to perform the complex calculus – with input from local, state and federal public safety and homeland security agencies ¹⁹ – to make and implement any decision to interrupt wireless service.

In sum, MetroPCS was disappointed, despite the commenters' frequent recognition that the Commission is sensitive to both communications and pubic safety issues, that recognition did not lead to the logical and obvious conclusion that the Commission alone should be delegated responsibility to make the final determination whether the rare circumstances exist justifying an interruption of wireless services. As MetroPCS emphasized in its initial comments, the FCC is the primary agency made responsible *by statute* for regulating radio communications in the public interest "for the purposes of promoting safety of life and property." In the absence of an industry-wide consensus to the contrary, the provisions in the Communications Act should be deemed controlling. Title I of the Act clearly designates the FCC as the governmental agency responsible for authenticating interruption decisions and communicating them to affected carriers. Titles II and III of the Act dictate that CMRS carriers, in being regulated as common carriers, have a duty to provide communications service upon a reasonable request from the

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¹⁸ BART Comments, 2 (suggesting the Commission "consider adopting requirements which include a prompt report to it of the circumstances surrounding any future shutdowns.").

¹⁹ Public Knowledge et al. Comments, 4.

²⁰ 47 U.S.C. § 151.

Commission, further demonstrating the Commission's rightful ability to make requests of service interruptions from wireless carriers.²¹

Despite this clear statutory mandate, several commenters advocate for state and local governments to have the right to order an interruption of federally licensed wireless service. State and local governments and agencies are not ideally suited for this task. First, they do not have the same amount of knowledge and experience in dealing with the intersection of public safety/homeland security policy and communications policy issues. The FCC – which is the expert agency on communications policy and has a well-regarded Public Safety and Homeland Security Bureau – has this experience. Second, none of the commenting state and local agencies cite legal authority sufficient to trump the policy determination that is found in the Communications Act as to where this authority should lie. Third, local or state agencies may be more susceptible to local, political or other pressures which could cause it to put a "thumb" in the scales of justice. Separating sensitive decisions of this nature from the local political environment is an important safeguard which can best be gained in the judicial branch or at the Commission.

MetroPCS also agrees with the Public Interest Groups that the Commission has the authority to preempt any state or local laws concerning interference with communications.²³ The Commission has and should use its authority under Section 4(i) of the Act to enact rules that

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²¹ Section 332(c)(1) dictates that CMRS service should be treated as common carriers. That provision, coupled with Section 201(a) which requires common carriers to provide service upon reasonable request of the Commission leads to the above conclusion. 47 U.S.C. §§ 201, 332(c)(1).

²² See e.g., BART Comments; CPUC Comments; Comments of Boeing Company (filed Apr. 30, 2012).

²³ Public Knowledge et al. Comments, 12 -13.

would preempt "state regulations that contradict or interfere with the Commission's goal of safeguarding the public interest."²⁴ Further, the Commission's authority under Section 202 preempts any local rules that encourage unjust and unreasonable discrimination and the Commission should so conclude.²⁵ Section 333 also provides additional authority that local government agencies, or even other federal agencies, are not permitted to make a decision that affects the services of a Commission-licensed entity.²⁶ Since the CMRS carriers whose networks are at the heart this proceeding are in fact licensed by the Commission, the conclusion is inescapable that, when a judicial order cannot be obtained in a timely manner, the Commission, not another local, state or federal agency or official, should determine if and when an interruption of wireless service by government is justified.

III. CMRS CARRIERS HAVE THE RIGHT TO TEMPORARILY DISCONTINUE WIRELESS SERVICES WITHOUT PRIOR COMMISSION APPROVAL

MetroPCS appreciates the level of concern expressed by the Public Interest Groups over the prospect of government-ordered interruptions of wireless services. However, they go too far when that suggest that wireless carriers do not have the authority to interrupt their services on their own volition.²⁷ Wireless carriers are not subject to the discontinuance of service procedures contained in Section 214 of the Communications Act, and the Commission's rules contain specific discontinuance of service rules that make clear that prior Commission approval is not

²⁴ See id. at 12.

²⁵ See id.

²⁶ Section 333 states that "[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications of an stations licensed or authorized by or under this Act. . . ." 47 U.S.C. § 333.

²⁷ Public Knowledge et al. Comments, 15 - 18 (suggesting that communications law prohibits wireless carriers from interrupting service).

required for temporary suspensions of service.²⁸ Nor are any constitutional issues raised by carrier-imposed actions since subscribers are subject to the contractual provisions set forth in the carrier's Terms and Conditions, and these uniformly recognize that service cannot be guaranteed in every particular location at all times and empower the carrier to make changes in the service as it deems appropriate. Finally, the public interest would not be served if wireless carriers were disallowed to periodically discontinue service from particular sites in the course of managing their complex, ever changing networks. In sum, a wireless carrier as a Commission licensee must be permitted to exercise control over its own spectrum by continuing or voluntarily interrupting service.

The MetroPCS position that wireless carriers are authorized to temporarily suspend their services voluntarily finds support in the many service specific rules which govern discontinuances of service. There are variations in these rules that have caused the Commission to initiate a proceeding to consider whether the rules should be harmonized to a greater extent.²⁹

In contrast to the Part 22 and Part 90 rules, many services, including those authorized by competitive bidding (such as our Part 24 Personal Communications Service rules and our Part 27 Miscellaneous Wireless Communication Services rules) contain no definition of permanent discontinuance. Thus, subject to meeting any service-specific construction and renewal requirements, a Part 24 or Part 27 licensee might conclude that it could discontinue service for a long period without fear of automatic license termination. Licensees in these services thus might retain their spectrum while it lies idle for extended periods, while Part 22 licensees (including cellular service licensees, which may provide directly competing services) are subject to automatic license termination if they discontinue service to subscribers for 90 days (120 days with a 30-day extension).

²⁸ See e.g., 47 CFR § 22.317.

²⁹ In the Matter of Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, & 101, 25 FCC Rcd 6996, 6998, ¶ 3 (rel. May 25, 2010) ("Discontinuance of Operations NPRM & Order"). Specifically, the Commission is considering adopting a uniform period that a facility could be out of service without the discontinuance being considered permanent which could affect the authorization. In doing so, the Commission observed:

However, the rules are generally consistent in that they recognize that licensed carriers may on occasion discontinue service from particular facilities and establish notice procedures and timelines for the carrier to seek Commission approval if service is not restored in a specified period. For example, the rule governing discontinuances by cellular service providers provides in relevant part:

§ 22.317 Discontinuance of station operation.

If the operation of a Public Mobile Services station is permanently discontinued, the licensee shall send authorization for cancellation by electronic filing via the ULS on FCC Form 601. For purposes of this section, any station that has not provided service to subscribers for 90 continuous days is considered to have been permanently discontinued, unless the applicant notified the FCC otherwise prior to the end of the 90 day period and provided a date on which operation will resume, which date must not be in excess of 30 additional days.³⁰

By specifying a 90 day period in which a cellular carrier may have a facility off the air without adverse regulatory consequences, the rule inherently acknowledges the authority of a cellular carrier to temporarily discontinue service.

The authority of a wireless carrier to discontinue service at a particular facility without prior Commission authority also is inherent in the move away from site-by-site licensing to geographic market area licensing for wireless services.³¹ The Commission properly recognized that wireless networks are dynamic systems that are constantly being modified as capacity needs change. Cell splitting often involves the discontinuance of service from a particular site, perhaps

The public interest is not served by such marked regulatory disparities. *Id.* at $\P 52$ (citations omitted).

³⁰ 47 CFR § 22.317.

³¹ See In the Matter of Amendments of Parts 1 and 22 of the Commission's Rules with Regard to the Cellular Service, Including Changes in Licensing of Unserved Area, Amendment of the Commission's Rules with Regard to Relocation of Part 24 to Part 27, Interim Restrictions and Procedures for Cellular Service Applications, Notice of Proposed Rulemaking and Order, FCC 12-20 (rel. Feb. 15, 2012).

on a permanent basis, and yet these changes are permissible without Commission authority or adverse regulatory consequence as long as the carrier otherwise maintains the requisite coverage required by the market license. Again, this market area licensing scheme recognizes that wireless licensee are granted the regulatory flexibility to install and decommission sites throughout the licensed area without specific individual authority from the Commission. It would be fundamentally inconsistent with this well-considered regulatory scheme to adopt any policy with respect to government requested interruptions of service that suggested that wireless carriers cannot shut off their own facilities in their discretion. Simply stated, CMRS carriers have the right to turn off particular facilities.

The Public Interest Groups also are mistaken to the extent that they suggest wireless carriers are subject to the requirement in Section 214 of the Communications Act, which would require prior approval prior to the discontinuance of service from a licensed facility.³² The Commission has specifically chosen to forebear from subjecting CMRS carriers to Section 214 at this time.³³ The Public Interest Groups have not cited sufficient grounds for the forbearance decision to be revisited. Indeed, the Commission is committed to reducing regulatory burdens, not increasing them, at this time.³⁴ Subjecting wireless carriers to the Section 214

³² Public Knowledge et al. Comments, 15-16.

³³ See generally In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16881-84 (1998).

³⁴ President Barack Obama issued an Executive Order on July 11, 2011 which called on federal agencies, *inter alia*, to use the "least burdensome tools for achieving regulatory ends," by conducting both quantitative and qualitative cost-benefit analyses. Exec. Order No. 13579, 76 FR 41587 (Jul. 14, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf; *See* also News Release, Statement from FCC Chairman Julius Genachowski on the Executive order on Regulatory Reform and Independent Agencies (Jul. 11, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308340A1.pdf.

discontinuance of service requirements simply would not meet the strict cost/benefit analysis that the agency must meet to justify an increase in regulatory burdens.³⁵ In the final analysis, MetroPCS cannot agree that Section 214 prevents carriers from exercising their right to interrupt their own service.³⁶

The Public Interest Groups seem to fail to appreciate the negative public interest implications of their position. Wireless carriers regularly interrupt service from particular sites for a variety of legitimate reasons which have nothing to do with local governments. For example, service is interrupted when a carrier has to work in a facility, or to replace an antenna or feedlines. In addition, carriers turn off facilities when such facilities are interfering or are causing issues with the carrier's service. Carriers also may discontinue service from a particular site when cell splitting or introducing a new reuse pattern to increase system capacity. Without this ability to voluntarily discontinue service in the course of managing a dynamic system, wireless service would be less reliable and the carrier would have to wait for a facility to fail (or get governmental approval) before working on its own facilities. This obviously would be unworkable. Importantly, a user's constitutional rights are not violated when a carrier discontinues service without a governmental mandate. Such rights are only implicated when governmental action is involved.³⁷ Wireless service providers are not governmental agencies.

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³⁵ As noted in the original MetroPCS comments, the relevance of Section 214 to this inquiry is that it strongly supports the view that Congress intended for the FCC to be the regulatory agency primarily responsible for regulating emergency discontinuance, reduction or impairment of service.

³⁶ See MetroPCS Comments, 14 n. 34.

³⁷ There are instances in which a private organization can be an instrument of state action where there is a sufficient entwinement between the state and the organization. *See e.g., Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). However, the fact remains that the First Amendment does not excuse persons from being bound by reasonable contractual commitments that have been voluntarily entered into.

and no user has a constitutional right to uninterrupted wireless service, particularly when the interruption comports with the services contract the end user voluntarily signed. MetroPCS agrees that individual rights need to be considered when a governmental agency is demanding the interruption, and that is why MetroPCS supports a judicial and Commission process to weigh the very important interests of the public.

IV. CONCLUSION

MetroPCS applauds the Commission's attention to the important policy issues raised by governmental requests for service interruption and the thoughtful comments that have been placed in the record provide a basis for Commission action. MetroPCS agrees with those commenters who support a single, nationwide process for considering whether to seek a wireless shutdown. However, MetroPCS reiterates that the Commission is the best governmental agency – either local, state or federal – to be designated as the final decision-maker and the official requestor of wireless service interruptions. Not only has the Commission been granted this authority under Titles I, II and III of the Act, but it is the governmental agency best situated to understand the complex interplay of communications policy and public safety/homeland security issues. MetroPCS also asserts that CMRS carriers have the right to voluntarily interrupt their own wireless service and are not, and should not be, subject to Section 214.

Respectfully submitted,

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